BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LYLE E. DAVIDSON	)	
Claimant	)	
VS	)	
	)	
BLAIR TRAILERS	)	
Respondent	)	Docket Nos. 225,161
	)	231,923
and	)	
	)	
FIREMAN'S FUND INSURANCE CO.	)	
GRANITE STATE INSURANCE CO.	)	
CYBERCOMP INSURANCE CO.	)	
Insurance Carriers	)	

ORDER

Claimant appealed the November 7, 2001 Award entered by Administrative Law Judge Jon L. Frobish. Oral argument was presented to the Appeals Board on May 14, 2002.

Appearances

Claimant appeared by his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and Fireman's Fund Insurance Company appeared by their attorney David S. Brake of Chanute, Kansas. Respondent and Granite State Insurance Company appeared by their attorney, Kim R. Martens, of Wichita, Kansas. Respondent and Cybercomp Insurance Company appeared by their attorney, Gregory D. Worth of Roeland Park, Kansas.

Record and Stipulations

The record and stipulations as set forth in the Award of the Administrative Law Judge (ALJ) are adopted by the Appeals Board (Board). Also, although clearly considered by the ALJ, the record should be clarified to include the May 7, 2001 Stipulation and Agreement. In addition, the year of the July 24 deposition of claimant is hereby corrected to read 1998 instead of 2001.

Issues

Although claimant commenced these two docketed claims by alleging two separate accidents, one of which was a series and the other a single traumatic event, the ALJ found there was a continuous series of accidents and traumas each and every working day. The ALJ, therefore, conformed the pleadings to the evidence and found a single series of accidents ending with claimant's last day of work on March 16, 1998.

The ALJ awarded claimant a 10 percent permanent partial disability based upon the 20 percent functional impairment rating of Dr. Kevin Mosier less the 10 percent the ALJ found preexisted the series of injuries. Claimant contends the percentage of disability should be higher. Respondent, Fireman's Fund Insurance Company (Fireman's) and Granite State Insurance Company (Granite) ask that the ALJ's Award be affirmed. Respondent and Cybercomp Insurance Company (Cybercomp) argue claimant suffered only a single accident on March 9, 1998, which caused only a temporary aggravation of his injury during Cybercomp's period of coverage. The nature and extent of claimant's disability and the date or dates of accident are the only issues for review.

Findings of Fact and Conclusions of Law

Having reviewed the entire record, the Board finds the Award of the ALJ should be modified to find claimant's preexisting functional impairment to be three percent to the body as a whole, and claimant's award of permanent partial disability compensation should be reduced by this amount.[1] In addition, for the period between March 16, 1998 and April 13, 2001, claimant was either unemployed or was working at less than 90% of the average weekly wage claimant was earning at the time of his injury. However, as claimant failed to prove that he made a good faith effort to obtain and retain appropriate employment during this period, claimant is not entitled to an award based on a work disability. Claimant is not entitled to a work disability after April 13, 2001, because he obtained employment

[1] K.S.A. 1997 Supp. 44-501(c).

that paid wages equal to 90% or more of his average weekly wage.[2] The Board otherwise agrees with the ALJ's analysis of the evidence as set forth in the Award. In particular, the Board agrees that, in this instance, greater weight should be given to the opinions of Dr. Mosier, the claimant's primary treating physician. Therefore, except as to the percentage of preexisting impairment, the Board affirms and adopts the ALJ and his findings and conclusions as its own as if specifically set forth herein.

Ascribing liability for ongoing injury for repetitive trauma cases has never been an exact science. Our appellate courts have struggled to develop rules and policies for such cases. The bright line rule announced in Berry[3] and amplified in Treaster[4] is to place the accident date as late as possible.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[5]

To the extent this may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent is given little consequence. Greater significance, however, is placed on the situation where the claimant changes employment and there are multiple or successive employers.[6] This is particularly true in cases where the claimant left work because of the injury as opposed to simply changing jobs for purely economic reasons. But that is not the situation presented in this case. Here claimant worked for one employer, the respondent, and only the insurance carriers changed during the period of injury. Furthermore, claimant left his job with respondent because of his injury.

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[2] K.S.A. 44-510e(a).

[3] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[4] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

[5] Treaster, Syl. ¶ 3.

[6] *See e.g.,* Surls v. Saginaw Quarries, Inc., 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

> We fail to see why the rule laid down in Berry should not be applied equally in a case where the dispute is over coverage between two insurance companies. The actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by Berry[7]

Kansas courts have shown a clear preference for finding one accident date and one injury in repetitive trauma cases. That date is either when claimant leaves work due to the injury or:

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[8]

It is not disputed that claimant suffered an accidental injury or injuries to his back while working for respondent. If claimant suffered a series of repetitive trauma injuries from his employment with respondent, it was an ongoing injury because he continued to work there performing essentially the same job. [9] Although claimant initially alleged he suffered two separate injuries at Blair Trailers, Inc., based on the testimony and medical evidence presented, the Board finds a series of accidents. A single accident date is easy to ascribe because he left that job because of his injury, which is one of the triggering events described in Treaster. Therefore, the ending date of that series of accidents will be claimant's last day of work which, in this case, appears to have been March 16, 1998.

> Under our statutory scheme, disability compensation must begin at some fixed point in time. In the case of disability which is the result of a personal injury caused by accident, the date of the accident becomes the date from whence compensation flows. K.S.A. 44-510e(a)(1). In the case of an occupational disease, the injury or condition is deemed to have "occurred" on the last day worked. K.S.A. 44-5a06.[10]

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[7] Anderson v. Boeing Co., 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[8] Treaster, Syl. ¶ 4.

[9] Claimant was given work restrictions on several occasions both before and after the settlement of his prior claim, including when he was released to return to work following his back surgery in 1997. But claimant testified he always returned to working outside those restrictions.

[10] Berry at 228.

Finally, it is important to note that these cases dealing with date of accident for repetitive trauma injuries were generally concerned with affixing liability for permanent disability compensation. Not for preliminary medical or temporary disability benefits. It follows, therefore, that the one accident date for purposes of the award of permanent disability does not necessarily control for purposes of awarding preliminary benefits.[11] The ALJ was correct to order those benefits that became due before Cybercomp's period of coverage to be the responsibility of the insurance company on the risk when the medical treatment was provided.

The ALJ's Award should be modified to increase claimant's permanent partial general disability.

Under K.S.A. 44-501(c), it is respondent's burden to prove the percentage of functional impairment that preexisted the subject series of injuries.[12] Respondent and Cybercomp contend this was established by a prior settlement that was based on a ten percent permanent partial disability.

> Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury.[13]

Claimant acknowledged receiving a lump sum payment to settle a prior workers compensation claim with respondent. That settlement was for a lump sum amount and therefore was presumably a strict compromise of all issues. As such, the settlement would have included consideration for claimant giving up his rights to future medical benefits and review and modification of that agreed Award. The record does not indicate what portion of the settlement amount was compensation for claimant relinquishing his rights to future medical treatment and modification of the award. Furthermore, although the lump sum settlement amount approximated a ten percent permanent partial disability rating, no physician rated claimant as having a ten percent impairment. Therefore, the best evidence concerning claimant's preexisting impairment comes from Dr. Mosier who apportioned three percent of his 20 percent impairment rating to claimant's preexisting condition.

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[11] Lott-Edwards v. Americold Corp, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[12] Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* ___Kan. ___(2001).

[13] Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 593, 738 P.2d 445 (1987).

Because claimant's injuries comprise an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of injury.

But that statute must be read in light of *Foulk*[14] and *Copeland.*[15] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . .[16]

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[14] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[15] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[16] Copeland, p. 320.

After claimant left work with respondent due to his injury on March 16, 1998, he briefly worked at two other jobs during 1998. He did not work again until April 13, 2001. There is a lack of evidence concerning claimant's efforts to find appropriate employment. Claimant estimated that he contacted approximately 25 employers between the time he left respondent in March of 1998 and when he started working for Russell Steel Products in April 2001, a period of about three years. That averages out to less than one job contact a month. Claimant said he kept a list of those job contacts but he failed to bring that list with him to the Regular Hearing. He could only recall the names of a handful of employers where he applied for work. The Board concludes claimant has failed to prove he made a good faith effort to find work during his periods of unemployment. Accordingly, claimant's actual wages cannot be used for determining his permanent partial general disability. Instead a wage will be imputed from the time claimant left work with respondent up through the time he started working at Russell Steel Products on April 13, 2001.[17]

For the period commencing April 13, 2001, when he started work at Russell Steel Products at $7.00 an hour, or $280 a week, claimant has been earning at least 90 percent of his average weekly wage and, therefore is limited to a disability award based on his 20 percent impairment of function less the three percent found to have preexisted, which results in a 17 percent functional impairment from this injury and a 17 percent permanent partial disability. The Board further finds that this $7.00 per hour represents the claimant's wage earning ability. Therefore a weekly wage of $280 will be imputed to claimant for the period between the date of accident and April 13, 2001.

The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

Award

WHEREFORE, the Board modifies the November 7, 2001 Award entered by Judge Jon L. Frobish, as follows:

Lyle E. Davidson is granted compensation from Blair Trailers and its insurance carrier Cybercomp for a March 16, 1998 accident and resulting disability, based upon an average weekly wage of $269.19, and a compensation rate of $179.47, for 17.71 weeks of temporary total disability compensation or $3,178.41 followed by 70.09 weeks of

[17] Had claimant established that he made a good faith effort, computing a work disability award utilizing claimant's actual post-accident wages would be problematic. The record shows that claimant worked for two employers in 1998 after leaving his employment with respondent. Claimant testified that he was paid $5.50 per hour at each, but, the record fails to establish the starting and ending dates for either job, the number of hours, days or weeks claimant worked, or the amounts he earned.

permanent partial general disability compensation at the rate of $179.47 per week or $12,579.05, for a 17 percent functional impairment and a 17 percent permanent partial disability making a total award of $15,757.46 which is all due and owing.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of May 2002

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
David S. Brake, Attorney for Respondent and Fireman's Fund Ins. Co.
Kim R. Martens, Attorney for Respondent and Granite State Ins. Co.
Gregory R. Worth, Attorney for Respondent and Cybercomp Ins. Co.
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director